No. 907

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

IN THE MATTER *of*

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Debtor.

DARRAGH A. PARK, as Chairman of a Group of Holders of Adjustment Mortgage Bonds,

Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS AND MUTUAL SAVINGS BANK GROUP, and others,

Respondents.

PETITION OF DARRAGH A. PARK, AS CHAIRMAN OF A GROUP OF HOLDERS OF THE DEBTOR'S ADJUSTMENT MORTGAGE BONDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justice of the Supreme Court of the United States:

Your Petitioner is Chairman of a Group of holders of the Debtor's Adjustment Mortgage Bonds and as such has been permitted to intervene in this proceeding both in the Interstate Commerce Commission and in the District Court.

Pursuant to law and the Rules of this Honorable Court your Petitioner respectfully prays that a writ of *certiorari* issue to review an order or judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in this cause on October 31, 1944, dismissing the appeals of the Petitioner and certain other parties from an order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered June 30, 1944, approving a Plan of Reorganization for the Debtor certified to it on April 10, 1944, by the Interstate Commerce Commission.

Summary Statement of the Matter Involved

This proceeding is one of the two proceedings upon which this Court on March 15, 1943, rendered its decisions commonly referred to as the *Western Pacific* case and the *Chicago, Milwaukee, St. Paul and Pacific* case interpreting Section 77 of the National Bankruptcy Act.*

This Court in this proceeding had issued its writ of *certiorari* to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered December 4, 1941, reversing an order or decree of the District Court approving a Plan of Reorganization for the Debtor, and on March 15, 1943, it rendered the decision mentioned above remanding the proceeding to the District Court for further action which Court in turn, after the determination of certain lien questions, referred the proceeding back to the Interstate Commerce Commission for further action pursuant to the mandate of this Court and to subsection (e) of Section 77 of the National Bankruptcy Act. Subsequently on April 10, 1944, but without accord-

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* *Ecker, et al.* v. *Western Pacific Railroad Corporation, et al.*, 318 U. S. 448; *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523.

ing the parties a full hearing, the Interstate Commerce Commission approved and certified to the District Court a new Plan of Reorganization for the Debtor. By order or decree entered June 30, 1944, the District Court approved the new Plan from which order and decree your Petitioner duly appealed to the Circuit Court of Appeals for the Seventh Circuit.

On October 31, 1944, on motion of certain parties in interest the Circuit Court of Appeals summarily dismissed the appeal for reasons stated in its opinion hereto annexed marked Appendix A. As appears from this opinion the Court determined adversely to the appellants without the benefit of Brief or oral argument a number of novel and difficult questions which are not covered or concluded by the decisions of this Court rendered March 15, 1943.

The reasons why the Petitioner asks that this Court issue a writ of *certiorari* to review this summary action of the Circuit Court of Appeals are the following:

On March 15, 1943, when this Court rendered the two decisions referred to above, there was pending in the Interstate Commerce Commission for further action a proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company which had been referred back to the Interstate Commerce Commission pursuant to subsection (e) of the National Bankruptcy Act after disapproval by the District Court of a Plan of Reorganization previously certified to the Court by the Interstate Commerce Commission. The legal status of that proceeding was therefore precisely the same as that of this proceeding after it came back to the Interstate Commerce Commission under the mandate of this Court.

On June 14, 1943, the Interstate Commerce Commission, without permitting the parties in interest to offer evidence of changed economic conditions which have resulted in a permanent elevation far above pre-war levels of the earn-

ing power of the properties of The Denver and Rio Grande Western Railroad Company, formulated and certified a new Plan of Reorganization which entirely eliminated its capital stock and made only approximately 10% provision for its General Mortgage Bonds—the most junior issue of Bonds corresponding generally as to character and lien to the Adjustment Mortgage Bonds of the *Chicago, Milwaukee, St. Paul and Pacific Railroad Company.* The District Court on October 25, 1943 approved the new Plan and the Railroad Company appealed from the order or decree of approval to the Circuit Court of Appeals for the Tenth Circuit. This appeal was perfected and after the filing of Briefs was set for argument and was argued at Wichita, Kansas, on November 13, 1944. During the pendency of this appeal the Interstate Commerce Commission submitted the Plan for acceptance or rejection by secured creditors of the Debtor and the Plan was rejected by one class of the creditors to which it was so submitted. On November 29, 1944, the District Court for the District of Colorado, entered an order or decree confirming the Plan notwithstanding such rejection and forthwith various parties in interest appealed from said order or decree of confirmation to the Circuit Court of Appeals for the Tenth Circuit, and by order of that Court dated January 17, 1945, the appeal is set for oral argument at Denver, Colorado, during the March, 1945, Term which begins March 12, 1945.

The new Plan of Reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company conforms in its broad outlines to the same general pattern as was used for The Denver and Rio Grande Western Railroad Company by eliminating the entire capital stock and making only partial provision (approximately 60%) for the Adjustment Mortgage Bonds.

The Petitioner submits that the junior lien creditors and stockholders of the Chicago, Milwaukee, St. Paul and

Pacific Railroad Company ought not to be foreclosed and their investments forfeited in whole or in part by a summary dismissal of their appeals by the Circuit Court of Appeals for the Seventh Circuit unless and until the Circuit Court of Appeals for the Tenth Circuit has determined the pending appeals and upheld the similar Plan which the Interstate Commerce Commission has prescribed for The Denver and Rio Grande Western Railroad Company.

For a further statement of reasons reference is hereby made to the annexed Argument of Counsel.

WHEREFORE, your Petitioner respectfully prays that a writ of *certiorari* be issued out of and under the Seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in the cases numbered on its docket, Nos. 8658, 8659, 8660, 8661, 8662, and entitled *In re: Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor,* and that the order or judgment of the Circuit Court of Appeals for the Seventh Circuit dismissing said appeal be reversed and set aside and that said appeals be heard by this Court or be remanded for hearing by the Circuit Court of Appeals for the Seventh Circuit, or that your Petitioner be given such other or further relief in the premises as to this Court may seem proper.

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January 29, 1945.

Argument

One of the established grounds for the granting of a writ of *certiorari* and perhaps the ground most frequently recognized by this Court is a conflict of opinion between different Circuits.

Such a conflict is present here since the Circuit Court of Appeals for the Tenth Circuit is giving full consideration to an appeal presenting the same basic questions as the appeal which the Circuit Court of Appeals for the Seventh Circuit has summarily dismissed.

While there is nothing quite so unpredictable as the decision of a judicial tribunal we are confident that the Circuit Court of Appeals for the Tenth Circuit will clarify many vital questions even if it does not reverse (as the Appellants hope) the order of the District Court approving the Plan of Reorganization and refer the proceeding back to the Interstate Commerce Commission for a new Plan conforming to the law of the land. We are equally confident that the Circuit Court of Appeals for the Seventh Circuit might easily have reached a conclusion different from that which it did reach if it had permitted counsel to present orally and by Brief their views upon the many novel and difficult questions which arise in these cases.

Included among these questions are the following:

(a) Whether this Court in referring this proceeding back to the Interstate Commerce Commission intended to circumscribe the action of the Interstate Commerce Commission?

(b) Whether the Court can circumscribe the action of the Interstate Commerce Commission or whether the Interstate Commerce Commission can limit the scope of the hearing required by subsection (d) after a reference of the

proceeding back to the Commission pursuant to subsection (e)?

(c) Whether the power to fix the effective date of a Plan of Reorganization which this Court says is given to the Interstate Commerce Commission by subsection (b) can be exercised so as to alter rights of the parties as fixed by subsection (l)?

(d) Whether the Court may lawfully disapprove a Plan of Reorganization if convinced that the Interstate Commerce Commission has undervalued the Debtor's properties and has failed to give full recognition to the Debtor's capitalizable assets?

(e) Whether a lien creditor may be divested by a Plan of Reorganization of his or its vested interests in income arising *pendente lite* and duly impounded by such creditor?

These are but a few of the many important questions which ought to be settled before the drastic Plans of Reorganization now pending in the Commission and in the Courts are put into effect. We do not understand that these questions are foreclosed by the decisions of this Court rendered March 15, 1943 under Section 77 of the National Bankruptcy Act in the *Western Pacific* case and in the *Chicago, Milwaukee, St. Paul and Pacific* case. But we would be lacking in candor if we failed formally to apprise this Court that a very serious question has been raised by the Judiciary Committee of the House of Representatives as to the admissibility of the interpretation which this Court has placed upon Section 77 of the National Bankruptcy Act in the aforesaid opinions of this Court rendered on March 15, 1943. Accordingly, we respectfully refer this Court to the unanimous Report of the Judiciary Committee, No. 1615 of the 2nd Session of the 78th Congress. In view of this Report of the Standing Committee of Congress which originated and formulated

the legislation we wonder whether the whole subject of reorganization under Section 77 may not fairly be open for reconsideration on the part of this Honorable Court.

But in any event we respectfully submit that this Court either by granting or by abstaining from immediate action upon the prefixed Petition for a writ of *certiorari* should preserve the *status quo* until the Circuit Court of Appeals for the Tenth Circuit has determined the pending appeals in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company.

Respectfully submitted,

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40 Wall Street,
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January 29, 1945.

Appendix A

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 8658, 8659, 8660, 8661, 8662

OCTOBER TERM AND SESSION, 1944.

In the Matter of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor.*	Motion to Docket and Dismiss Appeals.

October 31, 1944.

Before EVANS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* We have for decision a motion to docket and dismiss certain appeals filed herein July 29, 1944, from an order entered by the District Court June 30, 1944, approving the modified Plan of Reorganization for the debtor railroad corporation, as certified by the Interstate Commerce Commission in its third supplemental report and order dated April 10, 1944. The reorganization proceeding was instituted by the debtor on June 29, 1935, under § 77 of the Bankruptcy Act, and in the interim has been much litigated before the Commission and the courts. The Plan originally promulgated by the Commission was ap-

proved by the District Court October 21, 1940 (36 Fed. Sup. 193). From that approval, numerous parties appealed to this court, where the Plan was in part reversed and in part affirmed (124 F. 2d 754). Our decision was reviewed by the Supreme Court, which by its opinion of March 15, 1943 (*Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523), reversed in part and affirmed in part the judgment of this court and remanded the proceeding to the District Court for action in conformity with its opinion.

The history of the Plan, together with the numerous objections which have been made to its validity, thus being so voluminously recorded, there is no occasion for any statement or discussion further than that required to dispose of the instant motion. The appeals are by the debtor and certain junior creditors and their representatives.[1] The motion to docket and dismiss is by the Group of Institutional Investors and the Mutual Savings Bank Group, referred to as senior creditors. In connection with the motion is presented a "short record," which includes the order of the Commission and the opinion and decree of the District Court (from which the appeals were taken), approving the modified Plan.[2]

Appellants have filed their several answers to the motion to dismiss, attacking the validity of the Plan in numerous respects. The basis of appellees' contention in support of the motion is that the Commission and the court acted in conformity with the opinion and mandate of the Su-

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1. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor; St. Louis Union Trust Company and Illinois State Trust Company, as trustees under Chicago, Milwaukee and Gary Railroad Company first mortgage; National City Bank of New York and William W. Hoffman, as trustees under the Debtor's adjustment mortgage; Darragh A. Park, as chairman of a group of adjustment mortgage bondholders; and Hubert F. Atwater, *et al.*, as a protective committee for the holders of adjustment mortgage bonds.

2. Subsequent to the filing of the motion to docket and dismiss, the appeals were perfected. The complete record was filed September 19, 1944, so the motion is merely one to dismiss appeals.

preme Court, and, having so acted, no reviewable question is presented. In this connection, it is urged that numerous matters sought to be raised have heretofore been decided either by the opinion of the Supreme Court or by the opinion of this court. If appellees' position in this respect be sound, it would seem to follow that the appeals should be dismissed. We do not understand that the creditor appellants take issue with this premise, but they contend that changes were made in the Plan beyond the scope of the Supreme Court's ruling. It may be that the primary question raised by the debtor is in a different category, although we think such difference is more fanciful than real, as we shall hereinafter point out. We also note that a question is raised as to the right of the court to change the Plan so as to provide for approval of the voting trustees by the court rather than by the Commission.

This brings us to a consideration of the Supreme Court's opinion. Without entering a detailed discussion of that opinion, it is sufficient to state our conviction that every feature, except two, of this complicated Reorganization Plan was approved by the Supreme Court and all controversy with reference thereto definitely laid to rest. After discussion and decision of the many objections raised, the court (page 568) stated:

> "There are, however, two objections made by the General Mortgage bonds (senior creditors) which we think have merit. The first of these relates to the dispute as to the so-called 'pieces of lines east.' * * * The second of these objections is that the General Mortgage bonds are to receive under the plan only a face amount of inferior securities equal to the face amount of their claims."

The court proceeds to discuss and decide these two objections favorably to the senior creditors. The opinion then concludes:

> "We have considered all other objections to the plan and find them without merit. But for the exceptions we have noted, we conclude that the District Court was justified in approving the plan * * *."

Thus it will be noted that, but for the two objections decided in favor of the senior creditors, every feature of the Plan was approved, not only those specifically discussed and decided but "all other objections" as well.

The first objection related to the allocation of liens and the District Court was directed (page 569) to resolve the dispute. This was done by the District Court and approved by the Commission. No question is now raised as to the propriety of the court's action in this respect.

The court (commencing on page 569) discusses the merits of the second objection and concludes, in conformity with its previous decisions, that senior creditors, where junior creditors are permitted to participate in the Plan, are entitled to be compensated for their senior rights. The court held that the senior creditors were not accorded such treatment in the instant proceeding. Then follows the language which constitutes the real heart of the instant controversy. On page 571 the court stated:

> "But neither the Commission nor the District Court considered the problem. As we have indicated, the question whether senior creditors have received 'full compensatory treatment' rests in the informed judgment of the Commission and the court. A decision on that issue involves a consideration of the numerous investment features of the old and new securities and a financial analysis of many factors. Our task is ended if there is evidence to support that informed judgment. We are not equipped to exercise it in the first instance. Nor is it our function. * * * Our conclusion on the point is that, since junior interests are participating in the plan, the Commission and the District Court should determine what the General Mortgage bonds should receive in addi-

> tion to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights."

When the proceeding found its way back to the Commission, a large amount of cash had accumulated from the operation of debtor's railroad system, and the Commission ordered the distribution of some $52,000,000 of this cash to senior creditors as compensation for the loss of senior rights which had become merged in the Plan. To do this, it was thought necessary to change the effective date of the Plan from January 1, 1939 to January 1, 1944, and such change was effected. As we understand, the senior creditors were entitled to contract interest only to the effective date of the Plan, and the cash distribution directed would be the substantial equivalent of the contract rate during the five year period created by changing the effective date. The action of the Commission in this respect was approved by the District Court.

No contention is made but that the action of the Commission, approved by the court, is supported by evidence. The essential attack upon the Commission's order is that it was without authority to change the effective date of the Plan because not within the purview of the remandment. This involves a construction of the Supreme Court's direction to the Commission and the District Court. We know of no reason why a decision in this respect cannot be made now as well as at some future date. In other words, we are unable to perceive how any further light could be shed upon this controversy by permitting the appeals to stand.

Of course, it is true no doubt, as argued by the junior creditors, that they will be injured by the payments directed to be made to the senior creditors. It appears, however, that the same argument could be made against any provision for compensating such creditors. At any rate, we

know of no way by which senior creditors could be awarded additional compensation without adversely affecting other creditors. When in a proceeding of this character the financial position of one group is enhanced, it necessarily must be at the expense of some other group. We are of the view that the Commission acted not only within the authority but under the direction of the Supreme Court. Certainly it was clothed with the implied authority to do that which was directed. The method it employed to comply with such direction was the changing of the effective date of the Plan.

In this connection, it is interesting and perhaps pertinent to note that § 77 (1) rather plainly provides that the date of filing of the debtor's petition shall be the effective date of the Plan. However, in *Ecker, et al.* v. *Western Pacific Railroad Corp., et al.*, 318 U. S. 448, the court, in response to a challenge that the Commission was without power to fix some other date, stated (page 510):

> "But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization."

In the instant case, the Supreme Court held to the same effect (page 546). The court was content with deciding that the Commission had the power, without discussion as to the reason for its action, and we think it may be strongly implied that the court recognized the exercise of such power as final. The court having held, notwithstanding the statutory provision referred to, that the Commission was empowered to fix an effective date, it would seem to follow that the Commission was empowered in the instant case to change the date to such time as in its judgment was necessary to meet with and carry out its direction from the court. We are inclined to the view that no reviewable question is presented, but whether so or not, we are cer-

tain that we would be compelled to hold that the Commission was empowered to make the change.

Certain other questions are raised as to other minor changes made by the Commission, necessitated by the provision adopted for compensating senior creditors. We think they need not be discussed. They fall within the same category as the Commission's change in the effective date of the Plan, and what we have said and concluded with reference to the latter provision is applicable.

The debtor resists the motion to dismiss on the ground that it was denied a hearing on the value of its property, which it contends has greatly increased since the approval of the original Plan and even since the decision of the Supreme Court. When the proceedings were referred back to the Commission after the Supreme Court's decision, the debtor petitioned the Commission to reconsider the Plan on the basis of an increase in property value. The Commission received evidence as to the debtor's earnings up to the time of the hearing, with an estimate for the remainder of 1943. The Commission refused to change the Plan, which refusal was approved by the District Court. The debtor heretofore, both before this court and the Supreme Court, has urged that changed circumstances required that the Plan be referred back to the Commission for reconsideration. In response to this contention, the Supreme Court (page 543) said:

> "We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration."

The Supreme Court had before it the net earnings for 1940 and 1941, which disclosed that such earnings for the latter year were almost twice as much as for the former. The debtor seeks to evade this apparently conclusive pronouncement of the Supreme Court by arguing that it is

entitled to a hearing, not on increased net earnings but on the increased worth of its assets in connection with a decreased amount of its liabilities. We think this is a distinction without any real difference, for it would appear that the increase in the value of its assets and the decrease in the amount of its liabilities were the direct result of its increased earnings. However, the Supreme Court, in its discussion of the criterion to be applied in determining value for reorganization purposes, has definitely determined that it is the earning power. The court said (page 540):

> "The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn. * * * Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes."

The Supreme Court, in agreeing with this court that the debtor was not entitled to a further hearing because of the alleged changed situation, discusses debtor's experience during and following the first World War, and states (page 543):

> "We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future.'"

We are of the view that the District Court properly refused to refer the proceeding to the Commission for the purpose of considering further a valuation theretofore determined and approved by the Supreme Court. Conceivably a situation might arise in a proceeding of this character wherein a party might be entitled to be heard on account of a changed condition, but in view of what the Supreme Court has said in this and other cases, we think clearly that no such situation is presented. Furthermore, the debtor seeks to circumvent the test of increased net

earnings which the Supreme Court has prescribed and relies upon the alleged increased value of assets and the decreased amount of liabilities. In this connection, it is pertinent to observe that a memorandum taken from the record was handed to the court during oral argument, which discloses debtor's revenue and expenses for the years 1943 and 1944. While there was an increase in the amount of operating revenue in 1944 over the same period in 1943, there was a marked decrease in the net income for 1944, due to the greatly increased cost of operation. This situation is corroborative of the Supreme Court's prophetic discussion (pages 543-544) as to what is likely to happen in a normal year.

The modified Plan provides for the creation of a voting trust consisting of five trustees, and designate the groups or parties by whom such trustees are to be selected. It provides that upon a failure to designate by such groups or parties designation shall be made by the court. The Plan then provides, "The designation of any and of all of the voting trustees shall be subject to the approval of this Commission." This provision was inserted by the Commission for the first time. The court altered it by providing that approval of such voting trustees be by the court rather than by the Commission. It is here contended that this alleged alteration by the court requires that the Plan be sent back to the Commission, and that this court should so direct. No question is raised but that the court is as well equipped to approve such trustees as the Commission, or that any party will be aggrieved by such approval.

We have serious doubt that the Commission was authorized for the first time to insert this requirement in view of the limited scope of its authority, following the Supreme Court's opinion, heretofore discussed. Furthermore, we are doubtful if this requirement is in fact a part of the